FILE COPY.

DEC 8 19

JAMES H. McKE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 134.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY, DEFENDANT.

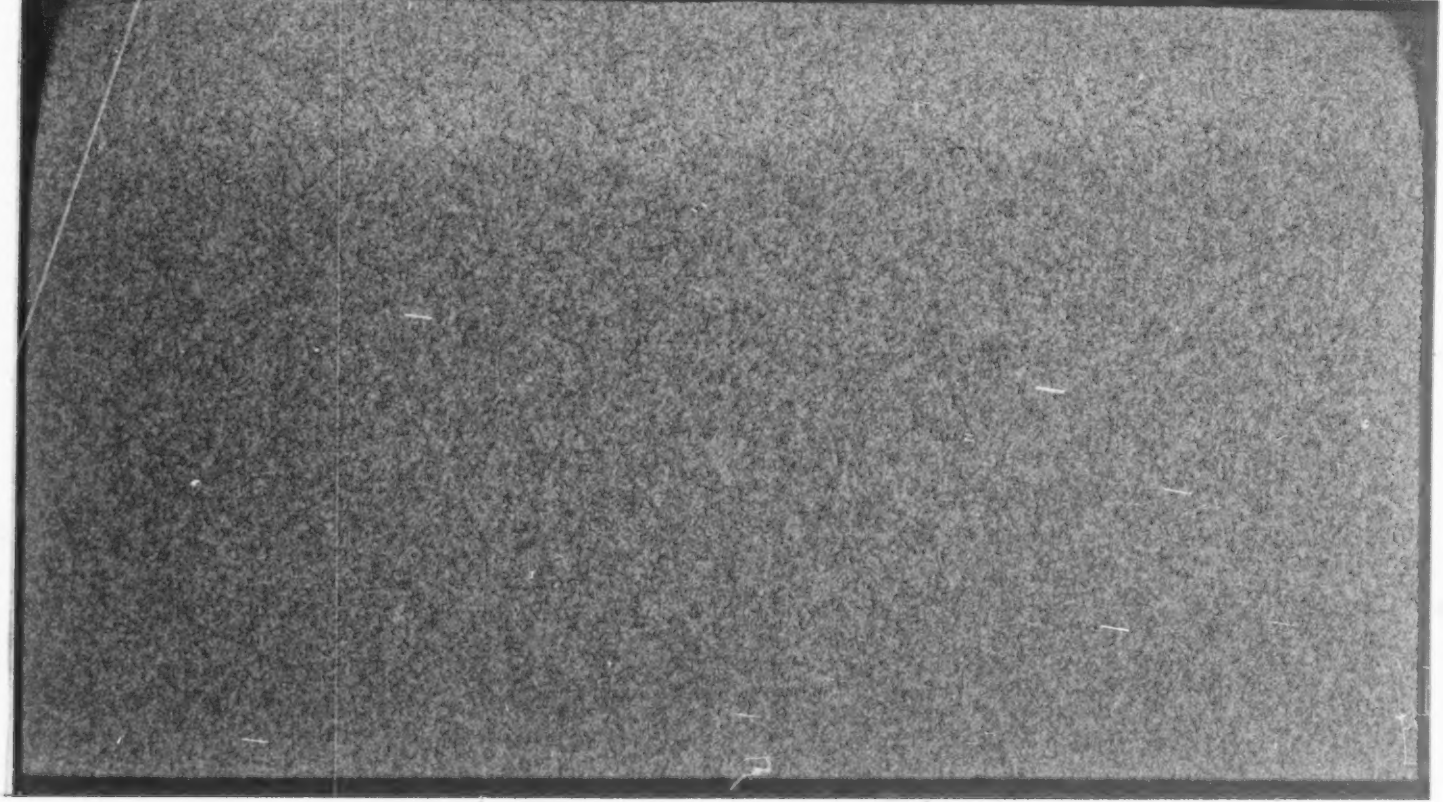
On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR DEFENDANT.

HARVEY D. GOULDER,
Advocate for Defendant.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

24176



Supreme Court of the United States

OCTOBER TERM, 1905.

No. 134.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

ERIE AND WESTERN TRANSPORTATION COMPANY, DEFENDANT.

BRIEF FOR DEFENDANT.

STATEMENT.

The facts are:

On the 21st day of October, 1891, a collision occurred in the Detroit River between the propellers New York, owned by petitioner's predecessor the Union Steamboat Company, and the Conemaugh, owned by defendant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.

November 11, 1891, defendant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United

States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York; denying all liability, and attributing the disaster solely to the Conemaugh; also setting up damage sustained by the New York, about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the damage to the New York; no process was issued and the decree dismissing the cross libel was not appealed from by the Union Steamboat Company.

On hearing *both* steamers were held at fault: 53 Fed., 553. Rehearing was had, resulting in the New York being held *solely* in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Marine Insurance Company and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the New York was solely at fault.

On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of defendant here for its own damage, and, as trustee, for the cargo damage, the decree providing, however, that the amounts allowed for cargo insured by the intervening companies be paid to them direct.

The owner of the New York, petitioner here, appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh *solely* at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this defendant *in personam* for the New York's damage: 82 Fed., 819. Petition for rehearing was denied.

This defendant and the intervening insurers petitioned this court for writ of *certiorari*. The petition was granted; on hearing *both* vessels were held at fault: 176 U. S., 187.

Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to defendant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay *the entire cargo damage*. The insurers on cargo which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67, was decreed to this defendant as trustee for cargo.

The owner of the New York then petitioned this court for writ of mandamus, directed to the District Court for the Eastern District of Michigan, to require entry of decree which would divide the damage to cargo *equally* between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S., 317.

Although the application to this court in that case was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The court said, among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was a matter for appeal. 178 U. S., p. 320.

Thereupon the owner of the New York appealed from the decree so entered. This defendant moved dismissal of the appeal on the ground that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only *in conformity with the mandate*, and so was the decree of this court. The motion to dismiss was denied: 104 Federal 561.

The appeal was then argued and the decree below affirmed: 108 Fed., 102.

The Union Steamboat Company (petitioner's predecessor) then (in its turn) petitioned the Court for writ of *certiorari*, which was granted. The cause was again tried here and the decree which had been entered by the District Court on mandate of this court was affirmed: 189 U. S. 363.

While in this court the last time the insurers who had covered that portion of the cargo for which this defendant had continued thereto as trustee, intervened for their own interest.

May 16, 1901, after dismissal of the petition for mandamus, the owner of the New York paid so much of the cargo damage as the decree required to be paid direct to the intervenors, and after the affirmance of the decree by this court the remaining damage and costs were paid as provided by the decree, and that case *closed*.

This statement was accepted by the Circuit Court of Appeals as correct. (52.)

The previous litigation was in the eastern District of Michigan, the Sixth Circuit Court of Appeals and this court; the present litigation began in the Northern District of Illinois.

The libel in this present case (11), after reciting generally the history of the litigation as hereinbefore shown, complains that in the former litigation the New York was required to pay the sum of $52,552.55, whereas one-half of the total damage was only $32,817.94; that the decree requiring such payment was arrived at by compelling the owner of the New York to pay all of the cargo damage and one-half of the damage to the Conemaugh, less one-half of the New York's damage; that it was not permitted to *recoup* or *offset* one-half of the amount it had been compelled to pay to the cargo from or against the owner of the Conemaugh.

While the terms "recoupment" and "offset" are used in the libel here, as matter of fact the proceedings show that the endeavor of the New York was to require *one-half* of

the cargo damage to look to this defendant for its damage. *Recoupment* or *offset* could, of course, only operate to the amount falling to this defendant by the decree: $13,083.33 and interest. The prayer of the libel was that libelant be allowed to recover against the Conemaugh, her engines, etc., the sum of $19,734.61, and interest.

To this libel the Erie & Western Transportation Company (defendant here) filed four exceptions (16):

> I. "That the allegation of said libel do not disclose any admiralty or maritime claim or lien upon said propeller Conemaugh.
>
> II. "Because it appeared from said libel that the Union Steamboat Company, under the course and practice of the admiralty courts of the United States, has already had its day in court for all damages arising from or consequent upon the collision referred to therein, has had its claim directly adjudicated upon with all the parties before the court, and the same is *res adjudicata*.
>
> III. "Because it appears from said libel that the Union Steamboat Company has already presented to a court of competent jurisdiction a claim of damage by reason of the collision set up in said libel, that the same has been adjudicated upon and paid by this claimant in accordance with the course and practice of the admiralty courts of the United States in cases of mutual fault, and to permit the libelant to maintain this action would be to permit the splitting of a single cause of action.
>
> IV. "Because libelant by its predecessor in ownership of the propeller New York has already had its day in a court of competent jurisdiction, has presented its claim, had it adjudicated upon and has received payment, according to the course and practice of admiralty courts of the United States in cases of mutual fault, on account of damage sustained by it by reason of the collision set up in said libel, with full right and opportunity and obligation to present all